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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 **Stanley Hall,**
9 Petitioner

10 -
11 **John Cooper, et al.,**
12 Respondents

CV-08-1637-PHX-SRB (JRI)

13 **REPORT & RECOMMENDATION**
14 **On Petition for Writ of Habeas Corpus**
15 **Pursuant to 28 U.S.C. § 2254**

16

I. MATTER UNDER CONSIDERATION

17 Petitioner, presently incarcerated in the Maricopa County Jail in Phoenix, Arizona,
18 filed an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on
19 December 17, 2008 (#36). On March 18, 2009, Respondent Arpaio filed his Answer (#71).
20 On April 3, 2009, Respondent Goddard filed an Amended Answer (#79). Petitioner filed a
21 Reply (styled “ Response to Respondents Answer”) on April 16, 2009 (#83). Respondents
22 have also now filed a Supplemental Answer (#98) and Joinder (#99), and Petitioner has filed
23 a Supplemental Reply (#104).

24 The Petitioner's Petition is now ripe for consideration. Accordingly, the undersigned
25 makes the following proposed findings of fact, report, and recommendation pursuant to Rule
26 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28
27 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

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II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

29 **A. STATE PROCEDURAL BACKGROUND**

30 Petitioner's Amended Petition challenges his detention in the Maricopa County Jail,
31 and attributes that detention to: (1) his conviction in Maricopa County Superior Court case

1 number CR-2001-003370; (2) Psychiatric Security Review Board case number 01-22-CR-
2 2001-003370; and (3) the then pending prosecution in Maricopa County Superior Court case
3 number CR-2008-166758.

4 **2001 Conviction** - On November 19, 2001, in Maricopa County Superior Court case
5 number CR-2001-003370, Petitioner was found guilty except insane to two charges of
6 Dangerous Assault by a Prisoner, class 2 felonies, and was sentenced to a term of 10.5 years
7 confinement in the Arizona State Hospital. (Amend. Pet. #36, Exh. 1-A, Verd. 11/19/01.)
8 After completing some three years of treatment, Petitioner was conditionally released from
9 the Arizona State Hospital on January 26, 2005. (Amend. Pet. #36, Exh. 13-A, Treatment
10 Plan at 1; Supp. Ans. #98, Exh. A, PSRB Order 11/23/04.)¹

11 **2006 Extradition** -On August 16, 2006, Petitioner was stopped by police as part of
12 an investigation of suspicions that Petitioner was the “Base Line Rapist.” Petitioner
13 was “handcuffed and arrested” for an out of state detainer. (Amend. Pet. #36 at 13.) On
14 November 18, 2006, Petitioner was extradited to San Antonio, Texas for trial on two counts
15 of theft committed in 1999. (Amend. Pet. #36, Exh. 13-A, Treatment Plan at 1; Supp. Ans.
16 #98, Exh. E Waiver of Extradition.)

17 Petitioner remained in Texas until August 14, 2008, when he was transported back to
18 Arizona for evaluation in the Arizona State Hospital. (*Id.*) Petitioner asserts that the Texas
19 prosecution was dismissed in July, 2008, after which he was returned to the custody of the
20 State of Arizona pursuant to a detainer. (Amend. Pet., #36 at 14.) He was returned to
21 Arizona on August 14, 2008. (*Id.*, Exh. 13-A, Treatment Plan, at 1.)

22 **2008 Psychiatric Proceedings** - On September 5, 2008, Petitioner was given a Notice
23 of Hearing by the Arizona Psychiatric Security Review Board (PSRB), setting a hearing to
24 determine whether: (1) Petitioner had violated the terms of his conditional release from the
25 Arizona State Hospital; (2) Petitioner's mental condition had deteriorated; and (3)
26 Petitioner's conditional release should be revoked or modified. (Amend. Pet., #36, Exh. 3-

¹ No explanation for the delay from the Order until the release appears from the record.

1 A.) That hearing was conducted on September 19, 2008. Petitioner appeared with counsel,
2 and a decision made to revoke Petitioner's conditional release, and an order or commitment
3 to the Arizona State Hospital issued. (*Id.* at Exh. 7-A (hand copied version of Order
4 9/25/08); Supp. Ans. #98, Exh. F. Minutes 9/19/08 at 2.) Petitioner was then detained in the
5 Arizona State Hospital.

6 On or about September 19, 2009, Petitioner filed with the PSRB an "Appeal" of the
7 September 19, 2008 decision, arguing *inter alia* that he had been denied his right to an
8 independent psychological evaluation, that the evaluating physician was biased, and he was
9 wrongly denied the right to represent himself. (Amend. Pet., #36 , Exh. 5-A.)

10 On or about October 16, 2008, Petitioner filed a "Motion for Appeal" with the
11 Maricopa County Superior Court in case number CR-2001-00370, raising various claims of
12 error in the PSRB decision and proceedings, including bias on the part of the evaluating
13 physician, and failure to consider conduct in relevant time frames. (Amend. Pet. #36, Exh.
14 6-A.) According to Respondents, Petitioner did not provide notice of this appeal to the
15 PSRB, and they, therefore did not forward the record to the Maricopa County Superior Court,
16 and thus this appeal has never been addressed. (Supp. Answer, #98 at 12-13.)

17 On November 10, 2008, Petitioner submitted a *pro se* interlocutory appeal in
18 Maricopa County Superior Court case number CR-2008-166758, challenging *inter alia* his
19 detention in the Arizona State Hospital. (*Id.* at Exh. 9-A.) On December 8, 2008, the
20 Arizona Court of Appeal returned the appeal unfiled on the basis that Petitioner was
21 represented, and thus could not file the matter on his own behalf. (*Id.* at Exh. 10-A (hand
22 copied version of letter).)

23 **2008 Prosecution** - Allegedly, on October 22, 2008, Petitioner assaulted a member
24 of the hospital staff. On November 25, 2008, an information was filed in Maricopa County
25 Superior Court case number CR2008-166758 charging Petitioner with the assault. (Amend.
26 Ans., #79, Exhibit B.) Custody of Petitioner was transferred to Respondent Arpaio, and
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1 Petitioner remained detained in the Maricopa County Jail until January 2010,² when he was
2 placed in the custody of the Arizona State Hospital. (#115, Notice of Change of Address.)
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4 **E. PRESENT FEDERAL HABEAS PROCEEDINGS**

5 **Petition** - On September 4, 2008, Petitioner commenced the present federal habeas
6 proceedings by filing his original Petition (#1), while he was in custody in the Arizona State
7 Hospital. On October 15, 2008, that petition was dismissed with leave to amend (#21), and
8 on December 17, 2008, Petitioner filed the instant Amended Petition for Writ of Habeas
9 Corpus pursuant to 28 U.S.C. § 2254 (#36). Petitioner's Amended Petition asserts seven
10 grounds for relief:

- 11 (1) Petitioner's 2006 arrest and detention were an illegal search and seizure, in
12 violation of the Fourth and Fourteenth Amendments;
- 13 (2) Petitioner's Fourteenth Amendment rights were violated when he was coerced
14 into signing a waiver of extradition, resulting in the 2006 extradition to Texas;
- 15 (3) Petitioner's Eighth and Fourteenth Amendment rights were violated when he
16 was denied due process during his September 2008, PSRB hearing because he
17 was not allowed to be present;
- 18 (4) Petitioner's Eighth and Fourteenth Amendment rights were violated when he
19 was imprisoned in the 2008 prosecution without access to bond, access to
20 methods of outside communication, and was not allowed to be present at his
21 bond hearing;
- 22 (5) Petitioner's Sixth and Fourteenth Amendment rights were violated in the
23 September 2008 PSRB proceedings because he was not allowed to be present
24 during hearings or speak in his own defense and his appointed counsel failed

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27 ² The online docket and minute entries of the Maricopa County Superior Court in
28 Case CR2008-166758 reflect that on January 11, 2010, Petitioner pled no contest and was
sentenced to time served. See <http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2008-166758> (last accessed 5/3/10).

to prepare a defense;

- (6) Petitioner's Fourth and Fourteenth Amendment rights were violated when his counsel was ineffective in the course of the 2006 extradition proceedings; and
 - (7) Petitioner's First and Sixth Amendment rights were violated when the Arizona Court of Appeals erred in failing to consider Plaintiff's claims challenging the 2008 PSRB decision.

On January 13, 2009, the Court issued its service Order (#43), dismissing various named respondents, and directing a response from the Maricopa County Sheriff, Joseph Arpaio and the Arizona Attorney General.

Answers - On March 18, 2009, Respondent Arpaio filed his Answer (#71), arguing that, insofar as Petitioner challenges his 2008 prosecution, the petition is not ripe because that prosecution is ongoing. Respondent further argues that Petitioner's claims are unexhausted. On April 3, 2009, Respondent Goddard filed his Amended Answer (#79), acknowledging that the Petition is not barred by the statue of limitations, but arguing that the claims are unexhausted.

Reply - On April 16, 2009, Petitioner filed his Reply (#83), arguing that he has no state remedies available to him.

Supplemental Answer - On May 20, 2009, the undersigned directed Respondents to supplement their answer and the record to address the “in custody” requirement and the available remedies for review of the PSRB decision, and Petitioner’s exhaustion of those remedies. (Order 5/20/09, #94.) On June 3, 2009, Respondent Goddard filed a Supplemental Answer (#98), in which Respondent Arpaio joined (#99). Respondents contend that Grounds 3, 5, and 7 of the Petition are unexhausted and procedurally defaulted. They argue Ground 4 is unexhausted, and in part constitutes a challenge to conditions of confinement which is not a ground for habeas relief. Respondents do not address the “in-custody” issue with regard to Grounds 1, 2, ant 6.

Supplemental Reply - On June 17, 2009, Petitioner filed his Supplemental Reply (#104). Petitioner complains that his petition for writ of certiorari to the U.S. Supreme Court

1 is not being properly processed, that the Court has intentionally misconstrued his claims, that
2 the undersigned and the District Judge are acting as confederates of the State of Arizona. He
3 argues he has remained in custody of some entity since his arrest in 2006, and in custody of
4 the PSRB and Arizona authorities since his original commitment, and that his custody has
5 been tantamount to consecutive sentences and should be handled accordingly. He argues that
6 he gave notice of his appeal to the PSRB, spoke with someone at PSRB and was advised he
7 had to file his appeal with the court. He argues he was shortly thereafter transported to the
8 Maricopa County Jail, where he was denied access to his materials for weeks, and was never
9 notified of the need to give further notice to the PSRB. He further argues that the state courts
10 have routinely refused to decide his motions, thus making any process unavailable, and thus
11 exhaustion unnecessary. Finally, Petitioner argues that Respondents waived their exhaustion
12 and procedural default issues by failing to raise them in their original Answer.

13 In his Supplemental Reply, Petitioner argues that the Court and Respondents have
14 misconstrued his claims, and attempts to clarify his assertions that there was an underlying
15 conspiracy among Arizona and Texas officials to falsely imprison him. (#104 at 1-2.) This
16 Court is obligated to liberally construe Petitioner's claims so as to make out viable
17 constitutional claims cognizable in a federal habeas proceeding. *See Zichko v. Idaho*, 247
18 F.3d 1015 (9th Cir. 2001). Much of what Petitioner contends would render his claims to be
19 based on something other than constitutional violations, and thus subject to dismissal for
20 failure to state a habeas claim. *See infra*, Section III(B) (Improper Civil Rights Claims).
21 Moreover, Petitioner has not sought to amend his Petition. Consequently, the undersigned
22 has not adopted the purported clarifications offered by Petitioner in his Supplemental Reply
23 as amendments, but instead has relied upon them to supplement the Court's understanding
24 of the existing claims in the Amended Petition.

25 **Objections and Appeals** - Prior to filing his Supplemental Reply, Petitioner filed a
26 Notice of Interlocutory Appeal to the Supreme Court (#95), which was construed as an
27 appeal to the Ninth Circuit, and a certificate of appealability denied. (*See Order 6/9/09,*
28 #101.) That appeal was dismissed for failure to prosecute on August 4, 2009 (#108).

1 On November 2, 2009, Petitioner filed a second Notice of Interlocutory Appeal to the
2 Ninth Circuit (#111). A certificate of appealability was again denied. (Order 11/6/9, #112.)
3 That appeal remains pending.

In the meantime, Petitioner made a series of filings opposing various orders and several motions seeking temporary restraining orders and preliminary injunctions. These have been resolved, with the most recent being denied by District Judge Bolton on October 5, 2009 (#110).

III. APPLICATION OF LAW TO FACTS

A. GROUNDS 1, 2, and 6: IN CUSTODY REQUIREMENT

In Custody Requirement - A petition for writ of habeas corpus is a challenge to custody. Pursuant to 28 U.S.C. § 2254(a), federal courts may “entertain an application for a writ of habeas corpus” only in behalf of a person who is “in custody pursuant to the judgment of a State court.” This “in custody” requirement has been interpreted to mean that federal courts lack jurisdiction over habeas corpus petitions unless the petitioner is “under the conviction or sentence under attack at the time his petition is filed.” *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) (*per curiam*). Similarly, under 28 U.S.C. section 2241(c)(3), a petitioner must be "in custody" in order to obtain relief in a habeas corpus proceeding.

Petitioner's grounds for relief all relate to his 2006 arrest and extradition (Grounds 1, 2, and 6) and his 2008 PSRB proceedings and commitment in the Arizona State Hospital (Grounds 3, 4, 5, and 7).

22 **2006 Extradition** - With regard to the 2006 extradition, Petitioner acknowledges that
23 those proceedings were dismissed in July, 2008, and he has been in the custody of the State
24 of Arizona pursuant to the 2001 conviction or the 2008 prosecution, since August, 2008.
25 Accordingly, Petitioner was not, at the time he instituted these proceedings, on September
26 4, 2008 (or at the time he filed his Amended Petition on December 17, 2008) "in custody"
27 pursuant to the 2006 arrest and extradition. Indeed, Petitioner acknowledges that his petition
28 was not mailed until "seventeen days after his arrival 8-14-09" back in Arizona. (Reply, #83

1 at 2.) Accordingly, as to Grounds 1, 2 and 6, this Court lacks jurisdiction to entertain those
2 claims.

3 Petitioner raises a series of near-miss arguments to avoid this conclusion. Petitioner
4 objects that he has continually been in some form of custody since 2006, and equates his
5 Texas custody to a consecutive sentence, citing *Peyton v. Rowe*, 391 U.S. 54 (1968). (Supp.
6 Reply, #104 at 4-5.) In *Peyton*, the Court held that a defendant remains “in custody” under
7 a judgment imposing consecutive sentences, so long as he is serving one of the consecutive
8 sentences. The alternative faced by the *Peyton* court was to force the petitioner to wait until
9 he began serving the later sentence in order to challenge the underlying conviction, with the
10 risk of faded memories. Here, Petitioner was not given “consecutive sentences” as the term
11 is used in *Peyton*, where the sentences were given in a single judgement, and the one being
12 challenged had not then yet commenced. Rather, here, Petitioner has been in custody under
13 different judgments, *i.e.* his criminal commitment, then his Texas proceedings, then his
14 Arizona 2008 prosecution. The fact that these were consecutive in time does not mean they
15 are “consecutive” as the term is used in *Peyton*.

16 Similarly, Petitioner misplaces his reliance on situations where custody is deemed to
17 continue even after an unconditional release. (Supp. Reply, #104 at 3.) It is true that
18 exceptions apply which permit habeas jurisdiction to extend where imprisonment ends but
19 some other form of custody continues, such as probation *Chaker v. Crogan*, 428 F.3d 1215
20 (9th Cir. 2005), or parole, *Jones v. Cunningham*, 371 U.S. 236, 237-28 (1963). Here,
21 however, Petitioner points to no form of custody remaining which arises under the orders
22 connected with his 2006 extradition. His subsequent incarceration in the 2008 prosecution,
23 and now the continuation of his criminal commitment from the 2001 conviction, were not
24 extensions of custody under the 2006 extradition and related Texas prosecution. Even if
25 Petitioner's subsequent troubles may have been exacerbated by the 2006 extradition, that
26 would not supply the necessary “in custody” status. In *Maleng*, the Court rejected the claim
27 that the potential for later enhancement of sentences for other crimes qualified to leave a
28 defendant “in custody.” 490 U.S. at 492. “When the second sentence is imposed, it is

1 pursuant to the second conviction that the petitioner is incarcerated and is therefore 'in
2 custody.'" *Id.* at 492-493.

3 **2008 PSRB Proceedings** - In contrast, with regard to the 2008 PSRB proceedings,
4 Petitioner remains "in custody" to the extent that, but for his then detention pending trial on
5 the 2008 prosecution, Petitioner would be in custody at the Arizona State Hospital. *See e.g.*
6 *Frazier v. Wilkinson*, 842 F.2d 42, 44 (2nd Cir. 1988) ("in custody" where intent to retake
7 custody once released from current confinement in another matter). Accordingly, the Court
8 does have jurisdiction over the grounds for relief related to those proceedings, Grounds 3,
9 5 and 7.

10 **2008 Prosecution** - Finally, at the time that Petitioner filed this action, he was in the
11 actual physical custody of Respondent Arpaio, the Maricopa County Sheriff, pursuant to the
12 bail order in the 2008 prosecution, and accordingly this Court has jurisdiction to address the
13 related claims in Ground 4.³

14 **Summary** - Based upon the foregoing, Petitioner fails to meet the "in custody"
15 requirement as to his 2006 extradition, and the related claims in Grounds 1, 2, and 6. Thus
16 this Court lacks jurisdiction to address those claims, and they must be dismissed. The Court
17 has jurisdiction as to Grounds 3, 4, 5, and 7.

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19 **B. IMPROPER CIVIL RIGHTS CLAIMS**

20 In his Ground 4, Petitioner complains, in part, that his Eighth and Fourteenth
21 Amendment rights were violated when he was imprisoned in the 2008 prosecution without
22 access to methods of outside communication. In his Supplemental Reply, Petitioner argues
23 that the Court and Respondents misconstrue his various grounds for relief, and asserts that

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25 ³ Arguably, the claims in Ground 4 have been rendered moot by Movant's conviction
26 and release to the custody of the Arizona State Hospital, unless there is some argument that
27 the claims would fit within the collateral consequences exception, *see Charon v. Wood*, 36
28 F.3d 1459 (9th Cir. 1994), or the capable fo repetition doctrine, *see Cox v. McCarthy*, 829
F.2d 800 (9th Cir. 1987). Because the parties have not been heard on this issue, and the claim
is plainly unexhausted, the undersigned does not reach the mootness issue.

1 underlying them is a series of conspiracies by various actors to wrongly incarcerate him.
2 Petitioner levels theses claims at the undersigned magistrate judge, District Judge Bolton, the
3 State of Arizona, the State of Texas, his attorneys, Respondents, his psychiatric case
4 manager, and the state courts. (Supp. Rely, #104 at 2-8.)

5 "[T]he essence of habeas corpus is an attack by a person in custody upon the legality
6 of that custody, and that the traditional function of the writ is to secure release from illegal
7 custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). A civil rights action, in contrast,
8 is the proper method of challenging "conditions of ... confinement." *Id.* at 498-99.
9 "According to traditional interpretation, the writ of habeas corpus is limited to attacks upon
10 the legality or duration of confinement." *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir.
11 1979). The appropriate remedy for [unconstitutional conditions of confinement] would be
12 a judicially mandated change in conditions and/or award of damages, but not release from
13 confinement." *Id.* at 892. Such claims are properly brought in a civil rights action under 42
14 U.S.C. § 1983.

15 With regard to Petitioner's purported conspiracy claims, the Constitution does not
16 itself prohibit conspiracies, merely whatever denials of constitutional rights may underlay
17 the conspiracy. In contrast, the Civil Rights laws do prohibit such conspiracies, but provide
18 relief only through a civil rights action under 42 U.S.C. § 1983 for state officials, *see e.g.* *Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir. 1992), private parties, *see e.g.* *United*
20 *Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir. 1989) (*en*
21 *banc*), or federal officials, *see e.g.* *Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995)
22 or similar provisions related to federal officials. *See also* 42 U.S.C. § 1985(3) (conspiracy
23 to deprive equal protection)

24 Accordingly, these claims are not properly brought in this habeas proceeding, and
25 must be dismissed without prejudice.

26

27 **C. EXHAUSTION AND PROCEDURAL DEFAULT**

28 Respondents argue that Petitioner's claims in his Grounds 3, 4, 5, and 7 are

1 unexhausted. They argue that those in Grounds 3, 5, and 7 are also now procedurally
2 defaulted, and thus barred from habeas review.

3 **Waiver** - Petitioner argues that Respondents have waived any defense as a result of
4 any failure to exhaust by not raising it until the Supplemental Answer (#98). (Supp. Reply,
5 #104 at 9.) However, Respondent Goddard raised the defense in his Original Answer (#69)
6 and his Amended Answer (#79). Respondent Arpaio raised it in his Answer (#71). The
7 Supplemental Answer by Respondents simply provides additional argument on the defense
8 as directed by the Court. (*See Order 5/20/09, #94.*)

9 Moreover, unlike most affirmative defenses, a failure to exhaust defense under 28
10 U.S.C. § 2254 is not waived by failure to raise it. “A State shall not be deemed to have
11 waived the exhaustion requirement or be estopped from reliance upon the requirement unless
12 the State, through counsel, expressly waives the requirement.” 28 U.S.C. § 2254(b)(3). No
13 such express waiver has been made by Respondents.

14 Finally, exhaustion is not a mere affirmative defense, wherein the burden of proof lies
15 on the Respondents as suggested by Petitioner. (Reply, #83 at 5.) To the contrary, when
16 seeking habeas relief, the burden is on the petitioner to show that he has properly exhausted
17 each claim. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981)(*per curiam*), cert.
18 denied, 455 U.S. 1023 (1982).

19 **Exhaustion Requirement** - Generally, a federal court has authority to review a state
20 prisoner’s claims only if available state remedies have been exhausted. *Duckworth v.*
21 *Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*). The exhaustion doctrine, first developed in case
22 law, has been codified at 28 U.S.C. § 2254(b) and (c). When seeking habeas relief, the
23 burden is on the petitioner to show that he has properly exhausted each claim. *Cartwright*
24 *v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981)(*per curiam*), cert. denied, 455 U.S. 1023
25 (1982). This requirement applies equally to state commitment proceedings as it does to
26 criminal proceedings. *See eg. Nelson v. Sandrittr*, 351 F.2d 284 (9th Cir. 1965) (dismissing
27 petition challenging state involuntary commitment for failure to exhaust state remedies).

28 However, by its terms, 28 U.S.C. § 2254 applies only to petitions by those “in custody

1 pursuant to the judgment of a State court." Although, in Grounds 3, 5, and 7, Petitioner
2 attacks the re-commitment order of the PSRB, his custody under that order stems from the
3 underlying 2001 criminal judgment. The re-commitment order simply altered the nature of
4 his custody (e.g. by being committed rather than released on conditions). Consequently, 28
5 U.S.C. § 2254 applies to the PSRB claims.

6 Nonetheless, even if §2254 did not apply, and Grounds 3, 5 and 7 were governed
7 under 28 U.S.C. § 2241, this Court would still be obligated to apply a prudential exhaustion
8 requirement. *Laing v. Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004).

9 **Procedural Default** -Ordinarily, unexhausted claims are dismissed *without prejudice*.
10 *Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991). However, where a petitioner has failed
11 to properly exhaust his available administrative or judicial remedies, and those remedies are
12 now no longer available because of some procedural bar, the petitioner has "procedurally
13 defaulted" and is generally barred from seeking habeas relief. Dismissal *with prejudice* of
14 a procedurally barred or procedurally defaulted habeas claim is generally proper absent a
15 "miscarriage of justice" which would excuse the default. *Reed v. Ross*, 468 U.S. 1, 11
16 (1984).

17 **Normal Criminal Rules Not Applicable** - Ordinarily, in relation to criminal
18 prosecutions, "to exhaust one's state court remedies in Arizona, a petitioner must first raise
19 the claim in a direct appeal or collaterally attack his conviction in a petition for
20 post-conviction relief pursuant to Rule 32." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir.
21 1994). Here, however, Petitioner's claims in Grounds 3, 4, 5, and 7 do not challenge a
22 criminal conviction. Rather, Grounds 3, 5, and 7 challenge Petitioner's re-commitment as
23 a result of the September 2008 PSRB hearing, and Ground 4 challenges his detention without
24 access to bond, etc. pending the culmination of his 2008 prosecution.

25 **Grounds 3, 5 and 7 - PSRB Claims** - Petitioner's Grounds 3, 5, and 7 challenge the
26 re-commitment order issued by the PSRB. Review of administrative agencies in Arizona
27 is governed by the Administrative Review Act, Ariz. Rev. Stat. § 12-901 *et seq.* Those
28 statutes provide for the filing of a complaint within 35 days of the service of the decision to

1 be reviewed, Ariz. Rev. Stat. § 12-904(A), and require that a notice of the action be filed with
2 the agency within 10 days of the filing of the complaint, Ariz. Rev. Stat. § 12-904(B). The
3 action is to be filed with the Superior Court. Ariz. Rev. Stat. § 12-905(A). Service of the
4 complaint and a summons"as in civil actions" must be effected upon the agency. Ariz. Rev.
5 Stat. § 12-906. "The final decision, order, judgment or decree of the superior court entered
6 in an action to review a decision of an administrative agency may be appealed to the supreme
7 court." Ariz. Rev. Stat. § 12-913.

8 Here, Petitioner has apparently initiated an action in the Superior Court by filing his
9 "Motion for Appeal" with the Maricopa County Superior Court in case number CR-2001-
10 00370, raising various claims of error in the PSRB decision and proceedings, including bias
11 on the part of the evaluating physician, and failure to consider conduct in relevant time
12 frames.⁴ (Amend. Pet. #36, Exh. 6-A.) That appeal has apparently not been addressed.
13 Thus, it appears that Petitioner's state remedies are unexhausted.

14 However, according to Respondents, Petitioner did not provide notice of this appeal
15 to the PSRB, and they, therefore did not forward the record to the Maricopa County Superior
16 Court, and thus this appeal has never been addressed. (Supp. Answer, #98 at 12-13.)
17 Petitioner presents no evidence of such a notice, but simply points to his earlier filing with
18 the PSRB of an "Appeal." (Amend. Pet., #36 , Exh. 5-A.) As Petitioner relates, however,
19 that filing was not acted upon, and Petitioner was directed by the PSRB to file his appeal
20 with the Superior Court. (Supp. Reply, #104 at 7.) Moreover, that document was sent a
21 month before his "Motion" with the Superior Court, and did not provide any notice of his
22 court filing, but simply asserted an appeal. Thus, it did not constitute a "notice" as mandated
23 by Ariz. Rev. Stat. § 12-904(B).

24 _____

25 ⁴ Respondents do not contend that the filing of this document in the existing criminal
26 proceeding and as a motion, rather than a separate complaint, resulted in a defective filing.
27 Moreover, in the experience of the undersigned, the Arizona courts (like this and most
28 others) often forgive such defects of form in filings by *pro se* litigants. Because the Arizona
Superior Court has not rejected it on this basis (or any other), the undersigned is not prepared
to say that the filing was fatally defective.

1 Respondents contend that the failure to provide this notice in a timely manner
2 rendered Petitioner's court filing fatally defective. While the Arizona statute mandates the
3 service of the notice within 10 days, it makes no reference to the effect of failure to provide
4 timely notice. The Arizona cases make clear that the 35 day deadline for initiating the action
5 is jurisdictional. *See e.g. Arizona Dept. of Economic Sec. v. Holland*, 120 Ariz. 371, 373,
6 586 P.2d 216, 217 (Ariz.App.1978); and *Smith v. Arizona Citizens Clean Elections Com'n*,
7 212 Ariz. 407, 413, 132 P.3d 1187, 1193 (2006). However, Respondents point to no
8 authority making the notice of the action jurisdictional. The undersigned finds none.
9 Moreover, the failure of the Arizona court to rule on the appeal suggests that the lack of
10 notice is not fatal. In the face of such lack of clarity, the prudent approach is to look to the
11 state courts to resolve the matter, and postpone federal review until they have done so. *See*
12 *Burkett v. Love*, 89 F.3d 135, 142 (3rd Cir. 1996)

13 Accordingly, the undersigned must conclude that Petitioner's appeal in the Superior
14 Court remains pending, and his state remedies unexhausted, but not procedurally defaulted.

15 **Ground 4 - 2008 Bail Proceedings** - An Arizona defendant may challenge his bond
16 proceedings by filing a "special action" in the Arizona Court of Appeals. *Simpson v. Owens*,
17 207 Ariz. 261, 85 P.3d 478 (2004). An adverse decision by the Arizona Court of Appeals
18 may be appealed by filing either a petition for review or a new petition for special action with
19 the Arizona Supreme Court. 17B Ariz. Rev. Stat., Rules of Special Actions, Rule 8 (b).

20 Here, Petitioner points to no such special actions or petitions for review. Accordingly,
21 these state remedies are unexhausted. Respondents point to no procedural bar that would
22 render these claims procedurally defaulted. Accordingly, the undersigned concludes that
23 Petitioner's state remedies on his bail proceeding remain unexhausted.

24 **Futility of Pursuing Remedies** - Petitioner suggests that he has sought to exhaust his
25 remedies, but his filings are ignored or his claims rejected. (Suppl. Reply, #104 at 6-7.).
26 Certainly his experience with his appeal from the PSRB re-commitment order evidences that
27 to some extent. When a state remedy is "ineffective to protect the rights of the applicant,"
28 exhaustion is not required. 28 U.S.C. § 2254(b)(1)(B)(ii). However, Petitioner offers

1 nothing to show that the state courts have refused to address his appeal, as opposed to merely
2 overlooking it. He does not, for example, suggest that he has pushed for a hearing or
3 determination on that appeal. Nor does Petitioner show that the delay in that proceeding is
4 not the result of his failure to provide the required notice, service, etc. on the PSRB.
5 Petitioner points to no other specific instance of the state courts failing to address his filings,
6 as opposed to simply failing to *sua sponte* address Petitioner's grievances. Moreover, the
7 fact that Petitioner may be inept or just unsuccessful at utilizing the state's procedures does
8 not render them "ineffective." Consequently, the undersigned does not find that these
9 processes are "ineffective."

10 **Interference** - Petitioner also suggests that his efforts to secure relief have been
11 intentionally hampered by various officials by his transfer to different forms of custody,
12 criminal prosecution, etc. (Suppl. Reply, #104 at 6.) He asserts that he has been denied
13 access to any court other than this one. (Reply, #83 at 4.)

14 It is true that it is only "available" remedies that must be pursued, 28 U.S.C. §
15 2254(b)(1)(A), and remedies may be deemed "unavailable" due to interference by state
16 officials in the use of those remedies, and thus exhaustion of them excused. *See Mayberry*
17 *v. Petcock*, 821 F.2d 179, 184 (3rd Cir. 1987). However, Petitioner points to no correlation
18 between such actions, and his failure to pursue his PSRB appeal or to file a special action on
19 his bail determination.⁵ Indeed, it appears that Petitioner has remained active in litigation
20 despite his re-commitment and detention without bond, including vigorously litigating this
21 action, filing his motion for appeal, etc. Petitioner's bare allegations to the contrary fail to
22 establish the kind of interference necessary to show the unavailability of such appeal and
23 special action.

24 Moreover, he offers no explanation why he cannot now pursue those remedies, which

25
26 ⁵ For example, Petitioner expends much ink decrying the two years he spent in Texas
27 following the extradition proceedings. However, that could have no bearing on his
28 challenges to the subsequent PSRB re-commitment order and the 2008 bail determination.
It would pertain only to his challenges to the extradition itself, which is no longer a
justiciable issue, since the extradition custody has terminated.

1 remain available to him.

2 **Summary re Exhaustion** - Based on the foregoing, the undersigned has concluded
3 that Petitioner's state remedies on Grounds 3, 4, 5, and 7 are unexhausted. Accordingly,
4 these claims must be dismissed without prejudice.
5

6 **D. SUMMARY RE CLAIMS**

7 Based upon the foregoing, the undersigned concludes that Petitioner fails to meet the
8 "in custody" requirement for Grounds 1, 2, and 6 which challenge his extradition
9 proceedings, and thus these Grounds must be dismissed with prejudice. The undersigned
10 also concludes that the conditions of confinement claims in Ground 4 and Petitioner's
11 conspiracy claims are not properly brought as habeas claims, and must be dismissed without
12 prejudice. Finally, the undersigned concludes that the remainder of the claims in Grounds
13 3, 4, 5, and 7 are unexhausted, and must also be dismissed without prejudice.
14

15 **E. CERTIFICATE OF APPEALABILITY**

16 **Ruling Required** - Rule 11(a), Rules Governing Section 2254 Cases, requires that in
17 habeas cases the "district court must issue or deny a certificate of appealability when it enters
18 a final order adverse to the applicant." Such certificates are required in cases concerning
19 detention arising "out of process issued by a State court", or in a proceeding under 28 U.S.C.
20 § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

21 Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention
22 pursuant to various State court judgments. The recommendations if accepted will result in
23 Petitioner's Petition being resolved adversely to Petitioner. Accordingly, a decision on a
24 certificate of appealability is required.

25 **Applicable Standards** - The standard for issuing a certificate of appealability
26 ("COA") is whether the applicant has "made a substantial showing of the denial of a
27 constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the
28 constitutional claims on the merits, the showing required to satisfy § 2253(c) is

1 straightforward: The petitioner must demonstrate that reasonable jurists would find the
2 district court=s assessment of the constitutional claims debatable or wrong.” *Slack v.*
3 *McDaniel*, 529 U.S. 473, 484 (2000). “When the district court denies a habeas petition on
4 procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA
5 should issue when the prisoner shows, at least, that jurists of reason would find it debatable
6 whether the petition states a valid claim of the denial of a constitutional right and that jurists
7 of reason would find it debatable whether the district court was correct in its procedural
8 ruling.” *Id.*

9 **Standard Not Met** - Assuming the recommendations herein are followed in the
10 district court’s judgment, that decision will be on procedural grounds, and under the
11 reasoning set forth herein, the undersigned finds that “jurists of reason” would not “find it
12 debatable whether the district court was correct in its procedural ruling.”

13 Accordingly, to the extent that the Court adopts this Report & Recommendation as
14 to the Petition, a certificate of appealability should be denied.

15

16 **IV. RECOMMENDATION**

17 **IT IS THEREFORE RECOMMENDED** that Grounds 1, 2, and 6 of the Petitioner’s
18 Amended Petition for Writ of Habeas Corpus, filed December 17, 2008 (#36) be
19 **DISMISSED WITH PREJUDICE**.

20 **IT IS FURTHER RECOMMENDED** that the balance of Petitioner’s Amended
21 Petition for Writ of Habeas Corpus, filed December 17, 2008 (#36) be **DISMISSED**
22 **WITHOUT PREJUDICE**.

23 **IT IS FURTHER RECOMMENDED** that to the extent the findings and
24 recommendations in this Report & Recommendation are adopted in the District Court’s
25 judgment, that a certificate of appealability be **DENIED**.

26

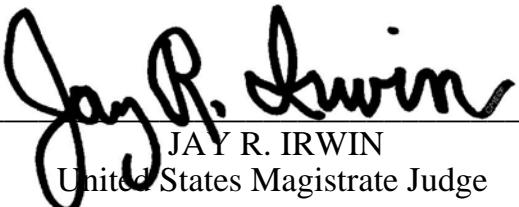
27 **V. EFFECT OF RECOMMENDATION**

28 This recommendation is not an order that is immediately appealable to the Ninth

1 Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of*
2 *Appellate Procedure*, should not be filed until entry of the district court's judgment.

3 However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall
4 have ten (10) days from the date of service of a copy of this recommendation within which
5 to file specific written objections with the Court. *See also Rule 8(b), Rules Governing*
6 *Section 2254 Proceedings*. Thereafter, the parties have ten (10) days within which to file
7 a response to the objections. Failure to timely file objections to any factual or legal
8 determinations of the Magistrate Judge will be considered a waiver of a party's right to *de*
9 *novo* consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th
10 Cir. 2003)(*en banc*).

11
12 DATED: May 25, 2010
13



JAY R. IRWIN
United States Magistrate Judge

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